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Office of the Attorney General

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Via Federal eRulemaking Portal

Samantha Deshommes, Chief
Regulatory Coordination Division
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security
20 Massachusetts NW
Washington, D.C. 20529-2140

RE: Comment on Proposed Rule: DHS Docket No. USCIS-20019-0023; Affidavit of Support on Behalf of Immigrants, 85 Fed. Reg. 62,432 (October 2, 2020), RIN 1615-AC39

Dear Chief Deshommes:

We, the Attorneys General for the States of California, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Virginia, Washington, Wisconsin and the District of Columbia, along with the Cook County State's Attorney, Corporation Counsel of New York City, and County Counsel of the County of Santa Clara County write to urge the U.S. Department of Homeland Security (DHS) to reject the *Proposed Rule: Affidavit of Support on Behalf of Immigrants*, 85 Fed. Reg. 62,432 (October 2, 2020), RIN 1615-AC39 ("Proposed Rule" or "AOS Rule"). During a global pandemic that has infected millions and claimed the lives of 229,000 Americans and counting, the Trump Administration should marshal all resources and strategies to maximize every person's chance to escape the disease and its worst effects. Instead, DHS has introduced a proposal that forces U.S. citizens to relinquish crucial healthcare coverage, as well as other public benefits, to preserve their best opportunity to sponsor a loved one for immigration purposes. The AOS Rule will needlessly thwart family unity, wreak havoc on public health and safety net systems, and weaken our country's economy over the long-term. The AOS Rule will interfere with the effective functioning of state and local governments across the country, which provide these essential public health and safety net services, endangering the health and well-being of all residents during a national public health emergency.

DHS proposes substantial changes to Affidavits of Support that will significantly restrict family-based immigration, long the cornerstone of the immigration system enacted by Congress. Family unity is a humane policy advanced by the Immigration and Nationality Act to promote

the health and well-being of the nation.¹ Each year hundreds of thousands of U.S. citizens sponsor their immediate relatives and other close family members, many of whom already reside in the U.S., to become lawful permanent residents through family-based petitions.² For decades, as part of this process, petitioning relatives have sponsored family members by agreeing to help economically support the intending immigrant if necessary.

Among the harsh changes sought, DHS proposes a joint-sponsor requirement when sponsors or their household members have received a means-tested public benefit within the 36-month period prior to the execution of the Affidavit of Support, and to disqualify individuals from serving as a joint sponsor if they have received such a benefit within the same time period. The Proposed Rule precludes sponsors from pooling their income with the income of other relatives who reside with them and are willing to promise support for the intending immigrant if needed, except where the relative is the sponsor's own spouse. The AOS Rule also needlessly subjects sponsors and their household members to onerous documentation requirements that range from the submission of IRS-issued certified copies or transcripts of their federal income tax returns for 3 years, to credit scores, and bank routing numbers.

Below we explain that the Rule will significantly deter eligible U.S. citizens and lawful permanent residents from participating in important social safety net programs, increase confusion and administrative burdens for state and local agencies, undermine our response to the ongoing global pandemic, and exacerbate the racially disparate impacts of COVID-19. In addition, we explain how the AOS Rule violates the Administrative Procedure Act, as it conflicts with the INA and fails to adequately assess the impacts of the agency's policy. Finally, we describe how the AOS Rule violates federal disability discrimination law, oversteps statutory limitations placed on the Systematic Alien Verification for Entitlements (SAVE) Program, and infringes on the Equal Protection principle in the Due Process clause of the Fifth Amendment of the U.S. Constitution.

I. THE AOS RULE WILL DETER ELIGIBLE U.S. CITIZENS FROM RECEIVING CRITICAL PUBLIC BENEFITS

Like the public charge inadmissibility rule³ issued by DHS last year, the AOS Rule penalizes low-income and working-class individuals who participate in public benefit programs

¹ See *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) (“The Immigration and Nationality Act (‘INA’) was intended to keep families together.”); *Kaliski v. District Director of Immigration & Naturalization Servs.*, 620 F.2d 214, 217 (9th Cir. 1980) (describing “the purpose of the [INA]” as “prevent[ing] the continued separation of families.”) U.S. Select Comm. on Immigration and Refugee Policy, U.S. Immigration Policy and the National Interest, 1981 (“[R]eunification . . . serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and well-being of the nation.”). See also *Obergefell v. Hodges*, 576 U.S. 644, 657 (2015) (recognizing the “centrality of marriage to the human condition” and “[t]he first bond of society is marriage; next, children; and then the family.”).

² See U.S. Dep’t. Homeland Security, Annual Flow Report: U.S. Lawful Permanent Residents: 2018 (Oct. 2019), tbl. 2, available at <https://tinyurl.com/DHS-LPRS-2018> (Exhibit 1).

³ Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (codified at 8 C.F.R. pts. 103, 212-14, 245, 248), (hereafter “Public Charge Rule”).

for which they are eligible. The AOS Rule, however, goes even further to create new, negative consequences for U.S. citizens and lawful permanent residents. While the inadmissibility rule applies to intending immigrants who are largely ineligible for federal benefits,⁴ the AOS Rule applies to any citizen or lawful permanent resident seeking to sponsor a family member to immigrate or adjust status. U.S. citizens and lawful permanent residents, especially those who have had permanent status for more than five years, are generally authorized to participate in critical means-tested social safety net programs, such as federally funded Medicaid and Supplemental Nutrition Assistance Program (SNAP), should they fall on economic hard times.⁵ Under DHS' Proposed Rule, U.S. citizens and lawful permanent residents, as well as their household members,⁶ must choose between receiving these critical means-tested public benefits or facing onerous and unnecessary new requirements for reuniting with children, spouses, parents, and other close relatives. Congress authorized these public benefit programs and extended eligibility to U.S. citizens and lawful permanent residents to promote health and well-being. Reduced participation in social safety net programs will endanger public health and productivity across communities.⁷ The stakes are especially high due to the ongoing COVID-19 public health emergency, and the specific challenges that the pandemic presents.

Research conducted in the wake of the Public Charge Rule has confirmed experts' warnings to DHS that its policies would result in significant disenrollment from, or avoidance of, valuable public benefits. Two recent studies by the Urban Institute confirm that individuals are increasingly avoiding public benefit programs, including Medicaid and other low and no-cost healthcare programs,⁸ in an attempt to prevent negative immigration consequences for themselves or their family members. Nationally, more than one in seven adults in immigrant families reported that, in 2019, they or a family member avoided a noncash government benefit program, such as Medicaid, the Children's Health Insurance Program (CHIP), SNAP, or housing subsidies for fear of risking future green card status.⁹ The impact of the chilling effect on low-income immigrant families was even higher. More than one in four adults in low-income

⁴ 8 U.S.C. § 1613(a). The Public Charge Rule applies in limited circumstances to lawful permanent residents where they are considered to be seeking readmission, such as following 180 days abroad. 84 Fed. Reg. 41,326; 8 U.S.C. § 1101(a)(13)(C).

⁵ See 8 U.S.C. §§ 1613(a), 1641(b).

⁶ See 85 Fed. Reg. 62,478 (proposed 8 C.F.R. 213a.2(c)(2)(iii)(C)(4)).

⁷ Millions of U.S. citizens have already petitioned for a close family member to immigrate, and are waiting for their loved one's visa number to become current—a process that can sometimes take years. *Nearly 4 Million People Waiting for Family-Sponsored Green Card*, Boundless (Nov. 26, 2019), <https://tinyurl.com/Family-Waitlist> (analysis of DHS data). These sponsors and their household members may be disposed to forgo or drop public means-tested benefits, and avoid such benefits for several years, to ensure that they will remain eligible as sponsors once their family member is off the waitlist.

⁸ The survey on which the studies were based asked respondents about their participation in a variety of government subsidized healthcare programs, including Medicaid, CHIP, free or low-cost medical care provided to people without health insurance through a local health clinic or health center, and health insurance that can be purchased through an exchange or marketplace. See *infra* n. 9 at fn 15.

⁹ Hamutal Bernstein, et al. *Amid Confusion over the Public Charge Rule, Immigrant Families Continued Avoiding Public Benefits in 2019*, 2, Urban Institute (May 2020), <https://tinyurl.com/Urban-2019-Benefit-Avoidance> (Exhibit 2). See also Jeremy Barofsky, et al. *Spreading Fear: The Announcement of the Public Charge Rule Reduced Enrollment in Child Safety-Net Programs*, HEALTH AFFAIRS, 39, No. 10 (2020) <https://tinyurl.com/healthaffairs-barofsky> (Exhibit 3).

immigrant families reported chilling effects during that same period.¹⁰ In California, one in six adults in immigrant families reported avoiding public benefits in 2019.¹¹ Avoidance occurred in families in which all foreign-born family members in the household were lawful permanent residents, as well as in families where all who were foreign-born were naturalized citizens.¹² Significantly, these studies show that disenrollment or withdrawal from public benefits increased from 2018 to 2019, as DHS proposed its Public Charge Rule, and through finalization of the rule, despite state and local efforts to ameliorate those effects during that same time.¹³ Moreover, chilling effects reduce participation in other federally funded programs excluded from public charge determinations, including exempt healthcare paid by states or localities.¹⁴

These studies add to an existing body of research demonstrating that harsh immigration rules involving public benefits drive eligible individuals away from safety net programs.¹⁵ The Proposed Rule, in which an individual's ability to petition for their relative hinges on their use of means-tested public benefits, will only increase the likelihood that eligible individuals forego critical public benefits.

II. THE AOS RULE WILL STOKE CONFUSION AND INCREASE ADMINISTRATIVE AND OPERATIONAL BURDENS ON STATE AND LOCAL GOVERNMENTS

The AOS Rule will spur additional confusion about immigration laws and public benefits, and create new administrative and operational demands on states and localities. These added

¹⁰ *Id.*

¹¹ Hamutal Bernstein, et al. *One in Six Adults in California Immigrant Families Reported Avoiding Public Benefits in 2019*, Urban Institute (May 2020), <https://tinyurl.com/Urban-2019-CA-BenefitAvoidance> (Exhibit 4).

¹² Bernstein, *supra* note 9 at 6, Fig. 1. See also Cal. Health Care Found., *Message Testing to Combat Public Charge's Chilling Effect in California*, 4-5 (March 2020) <https://tinyurl.com/CHCF-FocusGroupStudy> (Exhibit 5) (focus group study of long-term residents revealed their fear and uncertainty in using benefits, and their reticent to use benefits that might jeopardize their or their family's future immigration status).

¹³ Bernstein, *supra* note 9 at 2, 4, Fig. 1. See also Hamutal Bernstein, et al. *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018*, 2, Urban Institute (May 2019) <https://tinyurl.com/Urban-2018-Benefit-Avoidance> (Exhibit 6).

¹⁴ Bernstein, *supra* note 9 at 7, Fig. 2. A significant percentage of adults in immigrant families who reported avoiding noncash Medicaid or SNAP benefits also reported avoiding other excluded programs including the free or low-cost medical care programs for the uninsured (20.8 percent); the Supplemental Nutrition Program for Women, Infants, and Children, or WIC (16.3 percent); Affordable Care Act Marketplace health insurance coverage (14.1 percent); and free or reduced-price school lunches (13.0 percent). *Id.* See also NEW YORK CITY MAYOR'S OFFICE OF IMMIGRANT AFFAIRS, NEW YORK DEP'T OF HEALTH & NEW YORK CITY DEP'T HEALTH AND MENTAL HYGIENE, FACT SHEET: WIC ENROLLMENT TRENDS IN NEW YORK CITY, Feb. 2020, <https://tinyurl.com/NYC-WICTrends-Feb20> (Exhibit 7) (showing declines in WIC enrollment).

¹⁵ See Michael E. Fix & Jeffrey S. Passel, *Trends in Noncitizens' and Citizens' Use of Public Benefits Following Welfare Reform: 1994–1997*, Urban Institute (1999), <https://tinyurl.com/Fix-Study-1999> (hereafter “Fix Study”) (Exhibit 8); Jeanne Batalova et al., *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families' Public Benefits Use*, 4, Migration Pol’y Inst. (June 2018), <https://tinyurl.com/MPI-Chilling-Effect-Benefits> (Exhibit 9); Jeanne Batalova & Michael Fix, “Chilling Effects” of the Proposed Public-Charge Rule in Alameda County, CA Migration Pol’y Inst. (Nov. 2018), <https://tinyurl.com/Alameda-County-Chilling-Effect> (Exhibit 10); Bay Area Regional Health Inequities Initiative, *Immigration: Data and Methods, Estimate of Annual Impact of Potential Disenrollment from Select Benefits by Immigrants 2018* (Aug. 2018), <https://tinyurl.com/AlamedaCo-Estimates> (Exhibit 11).

burdens are a profound problem, even outside a national public health emergency. The COVID-19 pandemic, however, has heightened the public health consequences that result from widespread confusion and impacted the governmental resources available to respond.

DHS has previously emphasized to the public that its expansion of public charge doctrine is largely inapplicable to lawful permanent residents, and does not apply at all to citizens. Indeed, the U.S. Department of Justice (DOJ) has repeatedly stated that the expansion of the public charge definition does not apply to lawful permanent residents,¹⁶ even though lawful permanent residents can in some circumstances be subject to a public charge admissibility determination.¹⁷ Consequently, legal and community based organizations have engaged in significant education campaigns to inform the public that DHS's regulatory changes do not apply to lawful permanent residents in most circumstances, and do not apply to citizens' use of benefits.¹⁸ Yet confusion and benefit avoidance will increase due to the Proposed Rule.

Further, state and local benefits granting agencies have relied upon DHS' statement that "receipt of public benefits by U.S. citizens who are part of the alien's household, including benefits received by U.S. citizen children" are not taken into consideration as part of public charge inadmissibility determinations. 84 Fed. Reg. 41,309. Certain benefit-granting agency notices state that the federal government will consider only public benefits received directly by the person who is applying for the change in status, and "family members accessing public programs will not be considered as part of your public charge determination."¹⁹ States and local governments have also adopted streamlined application and eligibility determination processes to promote broad access to healthcare and nutrition programs.²⁰ The AOS Rule would upend federal policy by penalizing the use of benefits by sponsors and their family members—as opposed to immigrants seeking admission or adjustment of status. The AOS Rule will

¹⁶ Brief for Appellants at 39-40, *State of California v. U.S. Dep't of Homeland Security*, No. 19-17214 (9th Cir. Dec. 4, 2019); Def.'s Opp'n to Mot. for Prelim. Inj. at 2, *State of California, et al. v. U.S. Dep't of Homeland Security*, No. 19-cv-04975-PJH (N.D. Cal., Oct. 11, 2019).

¹⁷ 8 U.S.C. § 1101(a)(13)(C).

¹⁸ See e.g. Protecting Immigrant Families, et al, *Understanding Public Charge*, <https://tinyurl.com/publiccharge-guide> (last visited on Oct. 30, 2020) (Exhibit 12) (stating citizens are not affected by Public Charge Rule, and it only affects permanent residents who travel abroad for more than six months); Health Consumer Alliance, *What Is Public Charge?*, <https://tinyurl.com/HCA-public-charge> (last visited Oct. 11, 2020) (Exhibit 13) (stating that Public Charge Rule does not apply to U.S. citizens and most lawful permanent residents); Immigrant Legal Resource Center, *Public Charge Outreach Toolkit* (Sept. 2020), <https://tinyurl.com/ILRC-Sept2020-Presentation> (last visited Oct. 11, 2020) (excerpts attached as Exhibit 14).

¹⁹ See e.g., CAL. HEALTH & HUMAN SERVS. AGENCY, *PUBLIC CHARGE GUIDE* (August 2020), <https://tinyurl.com/CHHS-PC-Aug20> (Exhibit 15). See also New York State Office for New Americans, *Frequently Asked Questions on Public Charge*, <https://tinyurl.com/NYState-PCFaq> (Exhibit 16) ("[B]enefits received by an applicant's family members will not be considered as part of the 'public charge' test."); New York City Mayor's Office of Immigrant Affairs, *Public Charge Rule, Frequently Asked Questions*, <https://tinyurl.com/NYCMayorOffice-PC-FAQs> (Exhibit 17) ("I have children or family members in my household who use some public benefits. Could that hurt my immigration application?"); ILRC Toolkit at 12, *supra* note 18.

²⁰ December 10, 2018 Santa Clara County Comment at 17-20 (bundled public benefit system); December 10, 2018 California Attorney General Comment at 34-36 (streamlined application processes and automated and consolidated system for healthcare eligibility), 37-39 (streamlined enrollment in nutrition programs).

undermine all past assurances regarding public charge determinations' limited scope and benefit systems designed based on those assurances.

The AOS Rule's apparent consideration of receipt of Medicaid for children (including CHIP),²¹ benefits not included in the DHS Public Charge Rule, will be another major source of confusion. Public information campaigns in the wake of the DHS Public Charge Rule have gone to great lengths to assure members of the public that accessing benefits like Medicaid for children and CHIP will not make it more difficult for immigrants to be approved for a green card. If the AOS Rule is applied to penalize receipt of means-tested public benefits, including Medicaid for children and CHIP, by those counted in determining the sponsor's household size, including the sponsor's children, then that information and advice will be incorrect for U.S. citizens and lawful permanent residents seeking to sponsor their loved ones.²²

State and local governments have already invested heavily in public education campaigns and legal services to explain and respond to the new DHS Public Charge Rule.²³ The AOS Rule will undercut the effectiveness of these public education efforts and waste resources invested in them. In addition, State and local governments will have to make significant investments to answer patient and client questions, process enrollment change requests, assess the impact of the Rule and discuss it with community partners, and provide educational outreach on the Rule. It will also necessitate that state funded nonprofits retrain legal services staff, reducing the number of individuals that immigrant legal services organizations are able to serve. Reduced use of essential safety net services, such as public healthcare, will undercut the effective provision of these services by States and localities, rolling back hard-fought gains that have increased

²¹ The Proposed Rule is ambiguous with respect to household members whose use of public means-tested benefits are considered. *Compare proposed* 8 C.F.R. § 213a(c)(2)(ii)(C)(4) with *proposed* § 213a(g)(1) and § 213a(c)(2)(i)(C)(4) (tax returns for "individual who has signed a Contract Between Sponsor and Household Member") and § 213a(a)(1) ("household member (who executed a Contract Between a Sponsor and a Household member)" must file a change of address notice). The proposed regulations do not give the public notice regarding whether receipt of Medicaid by children in the sponsor's household will be considered in determining the sufficiency of an Affidavit of Support. Any final rule that includes consideration of household members' use of public means-tested benefits must clearly define the term household member as used for that purpose. Similarly, the proposed forms also need certain clarifications. For example, the proposed new Form I-864, Part 6. Item 9 asks, "Have you ever had to reimburse an agency for any means-tested public benefit issued to a sponsored immigrant . . . YES NO . . . If you answered 'Yes' to Item Number 9, provide an explanation, including the name of the agency that you reimbursed and the amount you had to reimburse in Part 12. Additional Information. Provide evidence that you have fully reimbursed the amount owed." The question will be clearer and elicit more accurate responses by asking whether the sponsor has received a written request from an agency seeking reimbursement for a means-tested public benefit issued to a sponsored immigrant. . . , and where you were still obligated to reimburse the agency. Part 9 of the same proposed form also needs to clarify that joint sponsors must not have "received any means-tested public benefit within 36 months of the joint sponsor completing that Form I-864" *and after the Rule's effective date*.
²² See *id.*

²³ See e.g. Laura V. Gonzalez-Murphy Decl. at ¶ 7 and Bitta Mostofi Decl. at ¶¶ 5-6, 11 filed in *State of New York v. U.S. Dep't of Homeland Security*, Case No. 1:19-cv-07777 (S.D.N.Y. Sept. 9, 2019 and April 28, 2020, respectively).

preventive care and reduced more expensive and complicated emergent care.²⁴ DHS should prevent growing confusion and fear and decline to move forward with its proposed changes.²⁵

III. THE RULE'S PENALTY FOR USE OF MEDICAID AND OTHER SAFETY NET PROGRAMS WILL WEAKEN STATES' AND LOCALITIES' RESPONSES TO THE PANDEMIC

The coronavirus (COVID-19) pandemic has highlighted the importance of considering the broad public health impacts of DHS public charge regulations that sow distrust in government services and reluctance to seek needed healthcare. In less than eight months, the COVID-19 pandemic has wreaked havoc. By the date of this letter's submission, over 9 million individuals have become infected in the United States alone, and over 229,000 have died.²⁶ Our country has struggled to control and suppress the virus, leaving the U.S. as one of the leading countries in COVID-19 infections and deaths.²⁷ The spread of the disease continues; it is rapidly rising in the Midwest and parts of the West and is expected to surge during the winter flu season.²⁸ Therapeutics and vaccines are still under development and it is unknown when a vaccine will be ready for FDA approval and available for national distribution.²⁹ Concurrently, the pandemic has brought about an economic catastrophe with widespread unemployment and loss of healthcare coverage—making the need for safety net programs even more critical.³⁰

²⁴ See, e.g., Dec. 10, 2018, County of Santa Clara, Public Charge Rule Comment Letter, at 16-23.

²⁵ DHS suggests that agencies should start notifying the public of potential immigration consequences, but this would be inappropriate given that the AOS Rule is only a proposal at this point, and benefits, such as healthcare coverage, may be necessary to access critically needed care and preventive services. 85 Fed. Reg. 62,442.

²⁶ *Covid in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://tinyurl.com/NYT-US-COVID> (last visited Oct. 30, 2020) (Exhibit 18).

²⁷ See Noah Higgins-Dunn, *The U.S. Is 'Not In A Good Place' As Daily Coronavirus Cases Grow Beyond 40,000*, *Fauci says*, CNBC (Sept. 28, 2020), <https://tinyurl.com/CNBC-COVID-9-28-20> (Dr. Anthony Fauci “has said for weeks that the U.S. is reporting an ‘unacceptably high’ number of new coronavirus cases every day. The country should aim for daily new cases below 10,000, not around 40,000[.]”); *Covid In The U.S.: Latest Map and Case Count*, *supra* note 26, (“Over the past week, there have been an average of 47,782 cases per day, an increase of 12 percent from the average two weeks earlier.”); CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC), COVID Data Tracker, *Trends in Number of COVID-19 Cases in the US Reported to CDC, by State/Territory*, <https://tinyurl.com/CDC-covid-dailytracker> (last visited Oct. 30, 2020) (Exhibit 19); *Covid World Map: Tracking the Global Outbreak*, N.Y. TIMES, <https://tinyurl.com/NYT-Covid-World> (last visited Oct. 30, 2020) (Exhibit 20); *COVID-19 Response and Reopening Schools Before the S. Comm. Health, Education, Labor & Pensions*, 116 Cong. (June 30, 2020), C-SPAN at 2:00:28 (Dr. Fauci statement that U.S. has inadequate control of the virus), <https://tinyurl.com/fauci-CSPAN>.

²⁸ Sarah Mervosh & Lucy Tompkins, *'It Has Hit Us With A Vengeance': Virus Surges Again Across the United States*, N.Y. TIMES, Oct. 20, 2020, <https://tinyurl.com/NYT-COVIDRise-10-20-20>.

²⁹ Katherine Wu & Gina Kolata, *Remdesivir Fails to Prevent COVID-19 Deaths in Huge Trial*, N.Y. TIMES, Oct. 15, 2020, <https://tinyurl.com/NYT-Remdesivir-10-15-20>.

³⁰ See generally, Lauren Bauer, et al., *Report: Ten Facts About COVID-19 and the U.S. Economy*, Brookings and Hamilton Project, Sept. 17, 2020, <https://tinyurl.com/COVID-Econ-Sept2020>; Reed Abelson, *Some Workers Face Looming Cutoffs in Health Insurance*, N.Y. TIMES, Sept. 28, 2020, <https://tinyurl.com/NYT-Coverageloss>; Adam Sonfield, et al., *COVID-19 Job Losses Threaten Insurance Coverage and Access to Reproductive Health Care for Millions*, HEALTH AFFAIRS BLOG, Aug. 3, 2020, <https://tinyurl.com/healthaffairs-coverageloss>; Josh Bivens & Ben

State and local communities have taken decisive actions to reduce the virus' spread and curb the growth of COVID-19 cases. Difficult policy decisions and the significant sacrifices that millions have made to reduce the spread of COVID-19 have saved lives. However, more progress is still necessary. DHS itself has admitted that treating receipt of benefits as a negative factor in immigration policy will deter immigrants from enrolling or remaining enrolled in Medicaid for themselves and their family members. 84 Fed. Reg. at 41,422 (DHS Public Charge Rule); 85 Fed. Reg. 62,468 (AOS Rule). DHS concedes that reduced Medicaid enrollment "could lead to . . . [i]ncreased prevalence of communicable diseases, including among members of the U.S. citizen population." 83 Fed. Reg. at 51,270.

While Medicaid and SNAP benefits are always critical for public health, COVID-19 has magnified their importance.³¹ Medicaid was a source of healthcare coverage for 1 in 5 individuals in the U.S. prior to the pandemic.³² In the early months of the pandemic, an estimated 5.4 million workers faced the loss of employer provided health insurance due to unemployment.³³ The national unemployment rate peaked at 14.7 percent in April 2020,³⁴ and has since remained at recession levels.³⁵ The need for publicly funded coverage has grown, and Medicaid plays a crucial role in connecting millions of individuals to preventive services, testing and treatment for COVID-19.³⁶ For instance, coverage increases the likelihood that a person will receive vaccinations, critical to combatting any infectious disease outbreak, and especially a pandemic.³⁷ In response to COVID-19, many states have implemented emergency measures to ensure that Medicaid and CHIP enrollees continue to have access to essential health services.³⁸ States, including California, have submitted disaster relief state plan amendments to the Centers

Zipperer, Health insurance and the COVID-19 shock, Economic Policy Institute, Aug. 26, 2020, <https://files.epi.org/pdf/206003.pdf> (Exhibit 21).

³¹ Among workers in companies that offer health benefits, those employed in companies with a relatively large share of lower-wage workers are less likely to be covered by their own company than workers in companies with a smaller share of lower wage-workers. Kaiser Family Foundation, Employer Health Benefits 2019 Annual Survey, 71-72, Fig. 3.9, <https://tinyurl.com/KFF-ERSurvey19>.

³² Samantha Artiga, et al., *Issue Brief: How Can Medicaid Enhance State Capacity to Respond to COVID-19*, KFF (Mar. 17, 2020) <https://tinyurl.com/KFF-Medicaid-COVID> (Exhibit 22).

³³ Stan Dorn, *The COVID-19 Pandemic and Resulting Economic Crash Have Caused the Greatest Health Insurance Losses in American History*, 3, Families USA (July 13, 2020) <https://tinyurl.com/COVID-Crash-inscoverage> (Exhibit 23).

³⁴ U.S. BUREAU OF LABOR STATISTICS, TED: The Economics Daily, *43 States at Historically High Unemployment Rates in April 2020*, <https://tinyurl.com/bls-5-28-20> (Exhibit 24).

³⁵ Eli Rosenberg, *The U.S. Economy Gained 661,000 jobs in September, as the Economic Recovery Slowed*, WASH. POST, Oct. 2, 2020, <https://tinyurl.com/wapo-sept20-recovslowed>.

³⁶ Dorn, *supra* note 33. See also, Rebecca Landucci, et al., *How States Are Facilitating Medicaid Enrollment During COVID-19-And How They Can Do Even More*, HEALTH AFFAIRS BLOG, June 17, 2020, <https://tinyurl.com/healthaffairs-medicaidcovid> (Exhibit 25).

³⁷ See Andrew Burger, et al., *The Influence of Hispanic Ethnicity and Nativity Status on 2009 H1N1 Pandemic Vaccination Uptake in the United States* 20:561-68, 565, J. of IMM. and Minority Health (2018) (Exhibit 26). This study highlighted the significance of health insurance coverage for immigrants as a protective factor during pandemics. The study analyzed rates of vaccination for H1N1 influenza, and found that those with insurance were twice as likely to be vaccinated as those without insurance.

³⁸ Nat'l Academy for State Health Policy, *State Medicaid and CHIP Strategies to Protect Coverage during COVID-19* (July 2, 2020) <https://tinyurl.com/NASHP-Medicaidcovid> (Exhibit 27).

for Medicare & Medicaid Services to suspend and revise policies that could prevent enrollees from maintaining coverage and accessing care during the current public health emergencies.

Similarly, SNAP is a crucial program to mitigate the collateral effects of COVID-19. The Families First Coronavirus Response Act allowed the U.S. Department of Agriculture (USDA) to authorize states to temporarily modify and simplify procedures for families to continue participating in or apply for SNAP, and it suspended, nationwide, SNAP's three-month time limit on benefits for unemployed adults under age 50 without children in their home. *See* Pub. L. 116-127, 134 Stat. 178, 187-88, Div. B, Tit. III, §§ 2301, 2302 (Mar. 18, 2020). All states have boosted emergency supplementary benefits for at least three months, and the vast majority, including California, have taken steps to ease SNAP administration and maintain participation.³⁹ The AOS Rule would undermine the significant efforts that states and Congress have undertaken to ensure access to these critical benefit programs.

While the current proposed rulemaking could hardly come at a worse time in our nation's history, it would harm crucial public health efforts even in the absence of a pandemic. Effective treatment of infectious and communicable diseases requires trust and cooperation from all state and local residents.⁴⁰ The U.S. Department of Health and Human Services' COVID-19 guidance affirms Medicaid's "critical role in helping states [...] respond to public health events,"⁴¹ covering a range of services needed to respond to infectious diseases.⁴² To effectively promote public health, those eligible must enroll in advance, not wait for emergent crises.⁴³ Yet "[w]ithout clear, official communications from the federal government," "immigrants and their families will likely avoid testing or treatment for dangerous, communicable diseases regardless of the Rule's exceptions."⁴⁴ State and local governments are currently doing their best to communicate to *all* residents the importance of accessing healthcare in the face of COVID-19.⁴⁵ The AOS Rule actively undermines this public health effort by encouraging would-be sponsors to avoid or minimize use of Medicaid, even when it is the most affordable form of health

³⁹ Center on Budget and Policy Priorities, *Fact Sheet: Most States Are Using New Flexibility in SNAP to Respond to COVID-19 Challenges* (July 7, 2020) <https://tinyurl.com/CBPP-Snapcovid> (Exhibit 28).

⁴⁰ Barbara Ferrer Decl. filed in *State of California v. U.S. Dep't of Homeland Security*, Case No. 3:19-cv-04975 (N.D. Cal Aug. 26, 2019) at ¶ 14; *see also* Georgina Cairns, et al., *Reputation, Relationships, Risk Communication, and the Role of Trust in the Prevention and Control of Communicable Disease: a Review*, J. of Health COMMUN (2013) <https://tinyurl.com/Cairns-Health-Journal> (Exhibit 29).

⁴¹ CENTERS FOR MEDICARE AND MEDICAID SERVICES, COVID-19 FREQUENTLY ASKED QUESTIONS FOR STATE MEDICAID AND CHILDREN'S HEALTH INSURANCE PROGRAM (CHIP) AGENCIES (June 30, 2020), <https://tinyurl.com/medicaidcovidfaq> (Exhibit 30).

⁴² CENTERS FOR MEDICARE AND MEDICAID SERVICES, FACT SHEET: COVERAGE AND BENEFITS RELATED TO COVID-19 (Mar. 5, 2020), <https://tinyurl.com/cms-medicaidcovid> (Exhibit 31).

⁴³ *See* Mari Cantwell Decl. filed in *State of California v. U.S. Dep't of Homeland Security*, Case No. 3:19-cv-04975 (N.D. Cal Aug. 26, 2019) at ¶¶ 36, 39-40.

⁴⁴ Charity Dean Decl. filed in *State of California v. U.S. Dep't of Homeland Security*, Case No. 3:19-cv-04975 (N.D. Cal Aug. 26, 2019) at ¶ 25.

⁴⁵ *See id.* at ¶¶ 34-35; Ferrer Decl. at ¶ 10. Due to ongoing concerns regarding the deterrent effects of public charge rules, June 2020 New York City launched a public education campaign "Seek Care Without Fear" to encourage harder-to-reach New Yorkers in low-income immigrant neighborhoods to seek COVID-19 testing and care, as well as other services.

insurance available.⁴⁶ Without that coverage, many will lack the access to medical care they need to combat the virus and to protect all members of our communities from further spread of the disease.

A. Interference with Health and Safety Net Programs Will Exacerbate the Racially Disparate Impact of COVID-19.

The COVID-19 pandemic has made clear extreme racial disparities that exist across the country. Latinos, as well as African Americans, Asian Americans, and other marginalized groups, are bearing the brunt of the pandemic. Analysis by the Centers for Disease Control and Prevention (CDC) shows that Latinos are 2.8 times more likely to contract COVID-19 compared to their White, Non-Hispanic counterparts, and are 4.6 times more likely to be hospitalized.⁴⁷ Latinos are also more likely to die of the disease.⁴⁸ Asian Americans and Pacific Islanders are facing higher rates of COVID-19 fatality.⁴⁹

Substantial proportions of Latinos and Asian Americans in the U.S. are foreign-born or are part of immigrant families. In 2017, 33 percent of Hispanics in the U.S. were foreign born.⁵⁰ In California, foreign-born individuals made up over a third of the Latino population.⁵¹ By one estimate Hispanic adults in families with noncitizens represent 4 in 10 Hispanic adults.⁵² Among all individuals of Asian descent in the U.S., nearly six-in-ten were foreign born in 2015, significantly larger than the immigrant share among Americans overall (13%) and other racial and ethnic groups that same year.⁵³ Consequently, effective strategies to reduce the

⁴⁶ The AOS Rule also will reduce the effectiveness of the States' efforts to connect immigrants with critical nutritional, housing, and other support programs that mitigate the negative impacts of rapidly increasing unemployment. See December 10, 2018 Center on Budget and Policy Priorities Comment at 59-60; John Stobo Decl. filed in *State of California v. U.S. Dep't of Homeland Security*, Case No. 3:19-cv-04975 (N.D. Cal Aug. 26, 2019) at ¶ 25; Sarah Neville-Morgan Decl. filed in *State of California v. U.S. Dep't of Homeland Security*, Case No. 3:19-cv-04975 (N.D. Cal Aug. 26, 2019) at ¶¶ 14-15, 22.

⁴⁷ CDC, COVID-19 HOSPITALIZATION AND DEATH BY RACE/ETHNICITY, updated August 18, 2020, <https://tinyurl.com/CDC-coviddata-race> (last visited on October 22, 2020) (Exhibit 32). See also Richard A. Oppel Jr., *The Fullest Look Yet at the Racial Inequality of Coronavirus*, N.Y. TIMES, July 5, 2020, <https://tinyurl.com/NYT-CDCCOVIDracedata>; Shawn Hubler, *Many Latinos Couldn't Stay Home. Now Virus Cases Are Surging In Their Communities*, N.Y. TIMES, June 26, 2020, <https://tinyurl.com/NYT-COVID-Latinos>.

⁴⁸ COVID-19 HOSPITALIZATION AND DEATH BY RACE/ETHNICITY, *supra* note 47. See also CAL. DEP'T. OF PUBLIC HEALTH, COVID-19 RACE AND ETHNICITY DATA, <https://tinyurl.com/CDPH-Covidrace> (last visited on October 22, 2020) (Exhibit 33) (Latinos overrepresented in COVID-19 deaths, especially in the older age cohorts.)

⁴⁹ Brandon W. Yan, et al., *Asian Americans Facing High COVID-19 Case Fatality*, HEALTH AFFAIRS BLOG, July 13, 2020, <https://tinyurl.com/Healthaffairs-AsianAms-COVID> (Exhibit 34); Wang, et al., *Asian-Americans and Pacific Islanders in COVID-19: Emerging Disparities Amid Discrimination*, J. of General Internal Medicine (2020) <https://tinyurl.com/Wang-APICOVID> (Exhibit 35).

⁵⁰ Luis Noe-Bustamante & Antonio Flores, *Facts on Latinos in America*, Pew Research Center, Sept. 16, 2019, <https://tinyurl.com/pew-latinos> (Exhibit 36).

⁵¹ CAL. SENATE OFFICE OF RESEARCH, A STATISTICAL PICTURE OF LATINOS IN CALIFORNIA 2017 UPDATE, 29-30, July 2017, <https://tinyurl.com/CalSenate-Latinos>, (Exhibit 37).

⁵² Dulce Gonzalez, et al., *Hispanic Adults in Families with Noncitizens Disproportionately Feel the Economic Fallout from COVID-19*, Urban Institute (May 2020) <https://tinyurl.com/Urban-LatinosCOVIDecon> (Exhibit 38).

⁵³ Abby Budiman, et al., *Key Facts About Asian Origin Groups in the U.S.*, Pew Research Center, May 22, 2019, <https://tinyurl.com/Pew-AsianAm> (Exhibit 39).

disproportionate impact of COVID-19 on Latinos and Asian Americans, and curtail the pandemic more generally, must address factors within immigrant communities that undermine public health, including increasing access to healthcare.⁵⁴

The federal government, including the White House, has repeatedly emphasized the need for a “whole-of-government approach” to address threats to national health security, including the COVID-19 pandemic.⁵⁵ Yet the AOS Rule would *reduce* participation in publicly funded health programs, leading to lower levels of coverage and reduced access to, and utilization of, healthcare services. In discussing COVID-19’s impact on racial and ethnic minority groups, the CDC has identified factors that influence group health, including lower rates of access to healthcare and workplace circumstances.⁵⁶ “Health differences between racial and ethnic groups are often due to economic and social conditions that are more common among some racial and ethnic minorities than whites. In public health emergencies, these conditions can also isolate people from the resources they need to prepare for and respond to outbreaks.”⁵⁷ The CDC encourages public health officials to “[l]ink more people among racial and ethnic minority groups to healthcare services for serious underlying medical conditions – for example, services to help them obtain necessary medications, follow treatment plans, or get testing and treatment if they have COVID-19 symptoms.”⁵⁸ In other words, improving access to healthcare services is a critical element of the public health response to overcome the pandemic’s disproportionate burdens on certain racial and ethnic groups.

The Proposed Rule does just the opposite—instead of promoting access to healthcare services, the Rule punishes U.S. citizens and lawful permanent residents for using critical health services like Medicaid, by hindering their ability to sponsor intending immigrant family members. Because many in Latino and Asian Pacific Islander communities were born abroad or are part of immigrant families, many may wish to sponsor or contract to support a family member for permanent residency. The AOS Rule, however, will deter many of these individuals

⁵⁴ STATE OF CALIFORNIA, COVID-19 VACCINATION PLAN, INTERIM DRAFT, 20-24, <https://tinyurl.com/Cal-VacPlan-VI> (Exhibit 40) (essential workers, Latinos, and the people who are under- or un-insured are critical populations in the state’s Vaccination Plan).

⁵⁵ The 2019-2022 National Health Security Strategy calls for coordination of a whole-of-government approach to “safeguard the health and well-being of people across the country.” See U.S. DEP’T. OF HEALTH & HUMAN SERVICES, NATIONAL HEALTH SECURITY STRATEGY, <https://tinyurl.com/NatlHealthSecurity> (last visited Oct. 13, 2020) (Exhibit 41). The CDC has supported a whole-of-government response to COVID-19 through its initiatives, activities, and tools. See U.S. DEP’T. OF HEALTH & HUMAN SERVICES, CDC ACTIVITIES AND INITIATIVES SUPPORTING THE COVID-19 RESPONSE AND THE PRESIDENT’S PLAN FOR OPENING AMERICA UP AGAIN, May 2020, at 1, <https://tinyurl.com/CDC-ReopenPlan> (Exhibit 42). The White House Coronavirus Taskforce has also reiterated the need for a whole-of-government approach to curb the pandemic. See PRESS BRIEFING BY VICE PRESIDENT PENCE AND MEMBERS OF THE CORONAVIRUS TASK FORCE, June 30, 2020, <https://tinyurl.com/WH-CoronavirusTF> (last visited on October 13, 2020) (Exhibit 43).

⁵⁶ CDC, COVID-19 IN RACIAL AND ETHNIC MINORITY GROUPS, <https://tinyurl.com/CDC-healthraceequity> (last visited on October 13, 2020) (Exhibit 44).

⁵⁷ CDC, COVID-19 IN RACIAL AND ETHNIC MINORITY GROUPS, previously available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> (last visited on May 31, 2020) (Exhibit 45).

⁵⁸ *Id.* (quote visible on page 3 behind header)

and their household members from using Medicaid, increasing the vulnerability and harm that Latinos and Asian Americans face during the pandemic.

B. The AOS Rule Will Exacerbate the Pandemic’s Impact on Essential Workers.

Throughout the pandemic, essential workers have labored to ensure that individuals and communities across the country remain healthy, safe, and fed. Yet many essential jobs, such as healthcare, homecare services, food-related and retail occupations, are filled by immigrants paid low wages, who in turn will face potential negative impacts from the AOS Rule.⁵⁹

Essential workers are often immigrants,⁶⁰ and are thus more likely than most to intend to help a family member immigrate by acting as a sponsor or a household member who promises to help support the immigrating family member. Yet these essential workers may need to rely on safety net programs. Over 4.3 million essential workers earn less than \$10 an hour and another 23 million earn between \$10 and \$20 an hour (12.9 million of whom earn less than \$15 an hour).⁶¹ Altogether, more than 57.1 percent of essential front-line workers earn less than \$20 per hour.⁶² Essential workers who receive means-tested public benefits within 36 months of the execution of the Affidavit of Support, would be prevented from sponsoring their relatives under the AOS Rule. Further, due to low wages, essential workers are more likely to rely on household members’ income to meet the sponsorship income requirements, which the Proposed Rule would be severely restricted.

To illustrate the AOS Rule’s impact on the essential workforce, consider the health and long-term care settings. Nationally, in 2017, immigrants accounted for 18.2 percent of healthcare workers and 23.5 percent of formal and nonformal long-term care workers.⁶³ More than one-quarter (27.5 percent) of direct care workers—nursing, home health, and personal care aides and 30.3 percent of nursing home housekeeping and maintenance workers—were immigrants.⁶⁴ Thirty-five and 29 percent of registered nurses in California and New York,

⁵⁹ See Ryan Nunn, et al., *Examining Options to Boost Essential Worker Wages during the Pandemic*, Brookings, June 4, 2020, <https://tinyurl.com/essentialworkerwages> (Exhibit 46); Sarah Thomason & Annette Bernhardt, *Front-line Essential Jobs in California: A Profile of Job and Worker Characteristics*, U.C. Berkeley Labor Center, May 14, 2020, <https://tinyurl.com/Cal-LaborCenter> (Exhibit 47).

⁶⁰ In California, immigrants are more likely than U.S. born workers to be employed in front-line essential jobs. Forty-eight percent of immigrant workers in the state are employed in these positions. Thomason, *supra* note 59.

⁶¹ Nunn, *supra* note 59.

⁶² *Id.*

⁶³ Leah Zallman, et al., *Care for America’s Elderly and Disabled People Relies on Immigrant Labor*, HEALTH AFFAIRS, 38, No. 6 (2019): 919-926, <https://tinyurl.com/healthaffairs-carebyimmigrants> (Exhibit 48); see also Jeanne Batalova, *Immigrant health-care workers in the United States*, Migration Policy Institute, May 14, 2020, <https://tinyurl.com/MPI-Immig-Healthwkr> (Exhibit 49) (showing Immigrant Share of Civilian Employed Workers by Occupation and States), and linked *State-Level Data on Immigrant Health-Care Workers* (downloaded on Oct. 13, 2020) (Exhibit 50).

⁶⁴ Zallman, *supra* note 63.

respectively, are immigrants.⁶⁵ Our healthcare in general, and care, in particular, for the elderly and individuals with disabilities will continue to depend heavily on immigrant workers.

Immigrants are also the foundation for our food system and critically needed janitorial services. California, for example, produces over a third of the country's vegetables and two-thirds of its fruits and nuts,⁶⁶ and immigrants represent over eighty percent (81 percent) of farmworkers in the state.⁶⁷ Immigrants comprise forty-three percent of all truck drivers, many of whom transport food products.⁶⁸ Forty percent of cooks and fifty-five percent of food preparation workers are immigrants.⁶⁹ A wide variety of settings need thorough cleaning and sanitization to eliminate coronavirus from surfaces.⁷⁰ According to the U.S. Bureau of Labor Statistics, in California and New York alone, well over 400,000 workers have been recently employed as janitors and cleaners in a variety of industries.⁷¹ A recent study revealed that in California 36 percent of essential janitors and building workers are immigrants.⁷²

Essential workers have played an indispensable role in meeting our most basic needs. We collectively benefited from these workers prior to the pandemic, and now we depend on them even more. Yet, the AOS Rule will force these workers, especially those who are low-wage earners and are immigrant or mixed-status families, to choose between participating in critical healthcare programs, such as Medicaid, or foregoing those programs to avoid the Rule's harsh new sponsor requirements.

C. The Rule Will Undermine Nutrition Programs, Increase Food Insecurity, and Worsen the Public Health Impacts of COVID-19.

The COVID-19 pandemic has led to an economic catastrophe, widespread unemployment,⁷³ and as a result, hunger is spreading across communities. National rates of household food insecurity have doubled, and the rates of childhood food insecurity have

⁶⁵ *State-Level Data on Immigrant Health-Care Workers*, *supra* note 63. See also Sabrina Fong Decl. filed in *State of New York v. U.S. Dep't of Homeland Security*, Case No. 1:19-cv-07777 (S.D.N.Y. April 28, 2020) at ¶ 13.

⁶⁶ CAL. DEP'T. OF FOOD AND AGRIC., CAL. AGRIC. PROD. STATISTICS, <https://tinyurl.com/CDF A-stats> (Exhibit 51).

⁶⁷ Thomason, *supra* note 63 at Fig. 6.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Roger Vincent, *Someday We'll Return to the Office. It'll Be Nothing Like We've Seen Before*, L.A. TIMES, May 8, 2020, <https://tinyurl.com/LAT-Companies-prep>; Roland Li, *Coronavirus Cleaning: Bay Area Businesses Ramp Up On Disinfectant*, S.F. CHRONICLE, March 7, 2020, <https://tinyurl.com/sfchron-cleaning>.

⁷¹ U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES, MAY 2019, JANITORS AND CLEANERS, EXCEPT MAIDS AND HOUSEKEEPING CLEANERS, <https://tinyurl.com/bls-janitors> (Exhibit 52).

⁷² Thomason, *supra* note 63 at Fig. 6.

⁷³ The economy has contracted because innumerable businesses have shuttered or reduced their services pursuant to government public health orders and lower demand, and some of these businesses have not survived. See Jay Shambaugh, *COVID-19 and The US Economy: FAQ on the Economic Impact & Policy Response*, Brookings, Mar. 23, 2020, <https://tinyurl.com/Brookings-Shambaugh> (Exhibit 53). The recovery in labor markets has been nascent and limited. See Eli Rosenberg and Heather Long, *The U.S. Economy Added 4.8 Million Jobs in June, but Fierce New Headwinds Have Emerged*, WASH. POST, July 8, 2020, <https://tinyurl.com/wapo-june2020-jobs>; see also Bauer, *supra* note 30 and Rosenberg, *supra* note 35.

quadrupled.⁷⁴ In California and other states, applications for key means-tested nutrition support programs have skyrocketed. The AOS Rule will prevent otherwise eligible U.S. citizens and lawful permanent residents from using such support, as well as amplify the chilling effects described above.

Other programs, such as charitable food providers and disaster relief, do not offer reliable alternatives to SNAP benefits.⁷⁵ And P-EBT, a one-time payment authorized by Congress to students eligible for free and reduced-price meals,⁷⁶ is not a sufficient alternative to SNAP in a time of crisis. P-EBT's design and the shortfall in P-EBT participation demonstrate that it is not an adequate substitute for the federal government's foremost nutrition program—SNAP. During a time of need, the AOS Rule will lead to lower participation in nutritional programs and increasing food insecurity in our states.⁷⁷

Increased food insecurity, especially among children, will compound and extend the negative public health consequences spawned by the pandemic. Food insecurity is associated with a wide range of negative outcomes for children, including worse general health, increased use of emergency department (ED) services, worse academic performance, poorer social outcomes, and anxiety and depression.⁷⁸ A study published last year by the American Academy of Pediatrics, explained how food insecurity may directly and indirectly negatively affect children's acute and chronic health.

In the case of very low food security, reductions in food amount or quality or disrupted eating patterns may lead to poorer weight outcomes and immune system functioning. Even when children do not experience reduced food intake, however, they may have poorer nutrition or eat lower-quality food because food-insecure households are more likely to have tight budget constraints and purchase cheaper, energy-dense foods. The stress produced by food insecurity may be

⁷⁴ Lola Fadulu, *As Hunger Spreads with Pandemic, Government Takes Timid Steps*, N.Y. TIMES, May 13, 2020, <https://tinyurl.com/NYT-Covid-hunger>; Laura Bauer, *The COVID-19 crisis has already left too many children hungry in America*, Brookings, May 6, 2020, <https://tinyurl.com/Brookings-Hunger> (Exhibit 54).

⁷⁵ See, e.g., Council on Community Pediatrics and Committee on Nutrition, *Promoting Food Security for All Children*, 136 PEDIATRICS 5 (2015) <https://doi.org/10.1542/peds.2015-3301> (Exhibit 55); Alexis Carmen Fernández Decl., filed in *State of California v. U.S. Dep't of Homeland Security*, Case No. 3:19-cv-04975 (N.D. Cal. Aug. 26, 2019) at ¶ 31.

⁷⁶ U.S. DEP'T OF AGRICULTURE, PANDEMIC EBT (P-EBT) QUESTIONS AND ANSWERS 1 (Apr. 15, 2020) <https://tinyurl.com/FNS-snapcovid> (Exhibit 56).

⁷⁷ Participation in school meal programs and P-EBT are linked to enrollment in SNAP and Medicaid. See Neville-Morgan Decl. ¶30; CAL. DEP'T. OF SOCIAL SERVS., PANDEMIC EBT, <https://tinyurl.com/cdss-covidebt> (last visited July 27, 2020) (Exhibit 57); see also CAL. DEP'T. OF SOCIAL SERVS., PANDEMIC EBT: PUBLIC AWARENESS OUTREACH TOOLKIT 2 (2020), <https://tinyurl.com/cdss-pebt-toolkit> (noting that consistent messaging is needed to build trust in P-EBT) (Exhibit 58).

⁷⁸ Margaret M.C. Thomas et al., *Food Insecurity and Child Health*, 144 PEDIATRICS 4, Oct.2019, <https://tinyurl.com/Pediatrics-Thomas> (Exhibit 59). See also American Academy of Pediatrics, *Promoting Food Security for All Children*, 136 PEDIATRICS 5, Nov. 2015, <https://tinyurl.com/Pediatrics-FoodSecurity> (Exhibit 60).

directly related to mental health outcomes such as depression, and may indirectly impact physical health through compromised immune functioning.⁷⁹

State and local governments have expended significant resources to streamline enrollment in nutrition programs, and maximize participation among those who need these supports. Abundant evidence regarding these efforts is already before DHS in the administrative record for the public charge rule.⁸⁰ To ensure full participation in SNAP and other nutritional programs across the country and mitigate food insecurity during the pandemic, DHS must reject the AOS Rule.

D. Temporary, Limited “COVID” Exceptions Are Ineffective and Irresponsible.

In connection with implementation of the DHS Public Charge Rule during the COVID-19 pandemic, USCIS issued an alert that is neither effective nor comprehensible, and has not alleviated disenrollment effects.⁸¹ Instead, despite DHS’ attempt at a “COVID” exception, the Public Charge Rule has undermined access to healthcare during the pandemic and failed to establish trust among immigrants that they can safely access key benefits and health services.⁸² A COVID-exemption for the AOS Rule also would not be sufficient to protect public health.

⁷⁹ Thomas, *supra* note 78 at 2.

⁸⁰ See *supra* note 20, CENTER ON BUDGET AND POLICY PRIORITIES COMMENT, *supra* note 46 at 57-58, and *infra* note 89. See also, *supra* note 77.

⁸¹ Indeed, a New York district court reviewed USCIS’s alert and substantial evidence of the public charge rule’s continuing deterrent effect and concluded that the alert was “plainly insufficient.” *New York v. U.S. Dep’t of Homeland Security*, _ F.Supp._, 2020 WL 4347264, *11 (S.D.N.Y. July 29, 2020), *rev’d on other grounds*, 974 F.3d 210 (2nd Cir. 2020). All of the evidence in the record in the New York case is also relevant to, and weighs against, the AOS Rule. See also March 19, 2020 Letter from multi-state coalition of Attorneys General to Acting Secretary Chad Wolf and Senior Official Cuccinelli.

⁸² See Bitta Mostofi Decl. filed in *State of New York v. U.S. Dep’t of Homeland Security*, Case No. 1:19-cv-07777 (S.D.N.Y. April 28, 2020) at ¶¶ 13-19; Amir Khafagy, *Some Immigrants Avoid New York Hospitals Because of the Public Charge Rule*, DOCUMENTED, May 21, 2020, <https://documentedny.com/2020/05/21/some-immigrants-avoid-new-york-hospitals-because-of-the-public-charge-rule/>; Sarah Mizes-Tan, *Latinos Disproportionately Impacted by COVID-19 in Sacramento, County Data Shows*, CAPRADIO, June 26, 2020, <https://tinyurl.com/Latinos-Sac>; Catherine McGloin, *Despite the Pandemic, Immigrants in Mass. Say They Are Afraid to Seek Medical Care*, WGBH NEWS, June 15, 2020, <https://tinyurl.com/wgbh-pandemic-fear>. See also *COVID’s Hidden Toll*, PBS FRONTLINE, July 21, 2020 (reporting clinic director and farmworkers’ fears of deportation during the pandemic), <https://tinyurl.com/Toll-Transcript> (Exhibit 61). Experts have recommended a suspension of the Public Charge Rule in light of COVID-19 to encourage immigrants to seek medical attention and access relief services. *Immigration Policy & COVID-19: Implications of the Public Charge Rule*, Issue 20-C18, June 2020, INDIANA UNIVERSITY PUBLIC POLICY INSTITUTE: CENTER FOR RESEARCH ON INCLUSION AND SOCIAL POLICY, IMMIGRATION POLICY & COVID-19: IMPLICATIONS OF THE PUBLIC CHARGE RULE, Issue 20-C18 (June 2020) <https://tinyurl.com/Policy-PCSuspension> (Exhibit 62). In 2019 the child uninsured rate increased, especially for Latino children, despite a strong economy at the time and an exception in the DHS Public Charge Rule for Medicaid for for children. See Joan Alker & Alexandra Corcoran, *Children’s Uninsured Rate Rises by Largest Annual Jump in More Than a Decade*, Georgetown University Health Policy Institute: Center for Children and Families (2020) <https://tinyurl.com/Georgetown-Children> (Exhibit 63).

IV. FURTHER LEGAL AND POLICY OBJECTIONS WARRANT REJECTING THE AOS RULE

Even if the country were not in the midst of the COVID-19 crisis, the AOS Rule would still be illegal and unwise. Many of our concerns were previously discussed in letters submitted in opposition to DHS's 2018 proposed rule on public charge inadmissibility, and should be considered by the agency in its review of the AOS Rule.⁸³ The principal objections raised in our 2018 comment letters are highlighted and summarized below, as are additional grounds for rejecting the AOS Rule.

A. The AOS Rule's Penalties Based on Receipt of Public Means-Tested Benefits Are Contrary to the INA and Congressional Intent.

DHS's proposed changes concerning the sufficiency of Affidavits of Support and the use of public benefits conflict with the INA and fall outside the bounds of the agency's authority.

The AOS Rule disqualifies an individual, otherwise eligible to sponsor a family member, from having their income and assets considered, solely because the intending sponsor or their household member has received a public means-tested benefit at any point three years prior to the execution of the Affidavit of Support. *See* proposed 8 C.F.R. 213a.2(c)(2)(ii)(C)(4)(i). The AOS Rule creates a categorical requirement that these sponsors must secure a joint sponsor, or otherwise, the application is denied. The joint sponsor also may not have received any public means-tested benefit at any point within three years. These provisions are contrary to the INA.

First, the categorical joint sponsorship requirement is contrary to 8 U.S.C. § 1183a(f)(6)(A). Section 1183a(f)(6)(A)(i) establishes that the sponsor shall demonstrate "the means to maintain income" through proof of income based on tax documents. Section 1183a(f)(6)(A)(ii) authorizes the intending immigrant and sponsor to rely on their "significant assets" to demonstrate the means to maintain sufficient income, if such assets are available for the support of the sponsored immigrant. The AOS Rule, however, denies the sponsor the ability to rely on their income and assets, because if the sponsor or the sponsor's household member has received a means-tested public benefit, and the sponsor fails to present a joint sponsor, the intending immigrant's application for permanent residency will be denied on public charge inadmissibility grounds. DHS is not authorized to establish regulations that render § 1183a(f)(6)(A)(i) and (ii) superfluous. *See* Proposed 8 C.F.R. § 213a.2(c)(2)(ii)(C)(4)(i) ("Even if the sponsor's projected household income . . . meets the applicable income threshold, the Affidavit of Support Under Section 213A of the INA will be determined to be insufficient on the basis of the sponsor's household income if . . . the sponsor or household member received means-tested public benefits on or after" the effective date of the Final Rule and within the 36-month period before the Affidavit of Support was executed.). Under current regulations, if a

⁸³ *See e.g.*, Dec. 10, 2018, California Office of the Attorney General, Comment Letter; December 10, 2018, New York, Oregon, Pennsylvania and Other States, Comment Letter; Dec. 10, 2018, County of Santa Clara, Comment Letter; December 10, 2018 New York City and NYC Health + Hospitals, Comment Letter; December 10, 2018, Washington D.C., U.S. Conference of Mayors and Other Cities, Comment Letter. These comment letters were filed in DHS Docket No. USCIS-2010-0012.

sponsor cannot meet the income threshold, their and the intending immigrant's assets may be considered or a joint Affidavit of Support may be submitted. 8 C.F.R. § 213a(c)(2)(iii).

Furthermore, the AOS Rule's treatment of receipt of means-tested public benefits is an unreasonable interpretation of Section 1183a(f)(1)(E) because there are many benefit recipients whose income exceeds the required income thresholds of 125 percent of the Federal Poverty Guidelines (100 percent for active duty armed service members).⁸⁴ These individuals would be required to submit an Affidavit of Support by a joint sponsor, even if they have "demonstrate[d] (as provided in paragraph (6)) the means to maintain an annual income equal to at least 125 percent of the Federal poverty line." 8 U.S.C. § 1183a(f)(1)(E). Under the statute, only sponsors who cannot satisfy the 125 percent of the poverty line under paragraph (1)(E) may be required to obtain a joint sponsor. *See* 8 U.S.C. § 1183a(f)(2). Yet Congress authorized States to allow participation of U.S. citizens in programs like Medicaid and SNAP at higher income levels. This is because, as the public charge administrative record shows, these programs are intended and designed to enhance citizens' ability to support themselves and others.

Finally, the disqualification of joint sponsors on the sole ground that they have received a means-tested public benefit during the relevant period, *see* 85 Fed. Reg. 62,442, is contrary to the INA's definition of "sponsor." Section 1183(f)(1) states that a sponsor is one who has executed an Affidavit of Support and met the five requirements listed therein. *See* 8 U.S.C. § 1183a(f)(1)(A)-(E). Receipt of a means-tested public benefit is not part of the definition.

B. Several Provisions in the Rule Demonstrate That It Is Arbitrary and Capricious.

The AOS Rule's provision concerning sponsor's and household members' receipt of means-tested public benefits lacks reasoned, plausible justifications, and thus is also arbitrary and capricious under the APA. *See Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (setting forth applicable standard for agency decisionmaking under the APA).

First, receipt of public means-tested benefits is not probative of a sponsor's ability to support the intending immigrant at the threshold required by the statute, 8 U.S.C. § 1183a. In all or most applications for family-based immigration, proof of a sponsor's income or proof of the sponsor's and intending immigrants' assets, or proof that other household members signed

⁸⁴ For example, the Medicaid Buy-In program is an optional state Medicaid benefit group for workers with disabilities who have earnings in excess of traditional Medicaid rules. Individuals with disabilities who would otherwise be ineligible for Medicaid because of their earnings can continue to work and access services and supports they need. The program is intended to ensure that workers with disabilities do not need to choose between healthcare and work. *See* CENTERS FOR MEDICARE AND MEDICAID SERVICES, MEDICAID EMPLOYMENT INITIATIVES, <https://tinyurl.com/Medicaid-EmploymentInitiatives> (last visited Oct. 22, 2020) (Exhibit 64). Similarly, foster children and youth, who may be the foster parent's dependent children, may be enrolled in Medicaid, even where their foster parent's income exceeds Medicaid eligibility levels. *See* U.S. DEP'T. OF HEALTH & HUMAN SERVICES, CHILDREN'S BUREAU, HEALTH-CARE COVERAGE FOR YOUTH IN FOSTER CARE—AND AFTER, 2015, https://www.childwelfare.gov/pubPDFs/health_care_foster.pdf (Exhibit 65). IRS PUBLICATION 501, DEPENDENTS, STANDARD DEDUCTION, AND FILING INFORMATION, <https://www.irs.gov/pub/irs-pdf/p501.pdf>.

contracts promising to help support the intending immigrant, are all more direct evidence of the sponsor's capacity to support the intending immigrant if needed. Indeed, DHS's prior position in 2006 was that the sponsor's receipt of benefits would "not add much evidence of probative value." 71 Fed. Reg. 35,738. While a sponsor's receipt of a public benefit could be treated as evidence, weighed alongside other proof, DHS has offered no evidence to support their new position that a person is unqualified to serve as a sole sponsor based only on their *or* their household member's receipt of a benefit. The AOS Rule's requirement of a joint sponsor based on receipt of means-tested public benefits, and its disqualification of joint sponsors for the same reason, lacks a reasoned justification.

Second, DHS proposes to limit arbitrarily, and without reasoned justification, who may execute a Contract Between Sponsor and Household Member (Form I-864A). Currently, the petitioning sponsor may include their income, as well as that of certain household members residing with the sponsor, to meet the required income threshold, provided that the household member properly completes and signs the Form I-864. These household members, or "relatives," who are eligible to sign such a contract include the sponsor's spouse, child, adult son, adult daughter, parent, and sibling. 8 C.F.R. § 213a.1 (definition of relative). The Proposed Rule would limit these household members to only the sponsor's spouse.

This change, however, is inconsistent with the justifications that DHS has offered. DHS asserts that Section 213A of the INA is intended to encourage immigrants to be self-reliant, and "[p]rotect[s] American taxpayers by requiring sponsors to be responsible for repayment of means-tested benefits received by sponsored immigrants." 85 Fed. Reg. 62,436. The agency further contends that the elimination of income from the sponsor's parent, minor and adult children, or sibling "will better ensure that the income a household member promises to make available to support the intending immigrant is actually available." 85 Fed. Reg. 62,433. The AOS Rule would actually weaken the assurances provided by the sponsor by removing any legally enforceable promise on the part of relatives within the household. Where benefit granting agencies exercise their discretion to seek repayment, they are less able to collect if there are fewer individuals legally obligated to reimburse the agency. Moreover, current regulations do limit which household relatives may sign a Form I-864A contract, though the agency mischaracterizes them as allowing a "potentially unlimited group of household members to satisfy the requirements of INA 213A." 85 Fed. Reg. 62,456.

The proposed restrictions on the sponsor's household income also run counter to the AOS Rule's expansive definition of household size for purposes of determining the income threshold that a sponsor must meet. *Compare* proposed 8 C.F.R. 213a.1(f)(1) with proposed 8 C.F.R. 213a.1(g). The definition of household size in the AOS Rule accounts for the individuals whom the sponsor may be responsible for supporting. However, the AOS Rule has unduly narrowed household income to that of the sponsor and the sponsor's spouse, provided that the spouse is at least 18 years old and has signed a Form I-864A. Thus, DHS fails to recognize that relatives within this same household may be willing and able to assist the sponsor in supporting the intending immigrant. *See* 85 Fed. Reg. 62,456 (acknowledging lack of evidence that non-spouse relatives are less likely to uphold their contract obligations). DHS's inconsistent treatment of

relatives within a household is unjustified because family members within households may be both sources of economic dependency and support. There are a myriad of ways in which relatives within a household may rely on one another for economic support and also contribute income to meet the household's and a sponsored immigrant's needs. DHS has offered no reasoned justification for treating relatives within a household in a one-dimensional manner that identifies them as needing economic support, and therefore increasing the income threshold that the sponsor must meet, while precluding the same relatives from any opportunity to sign a contract promising to help support an intending immigrant. The AOS Rule's incongruous treatment of relatives within a household indicates result-oriented rulemaking designed to eliminate sources of income and make it more difficult for U.S. citizens and lawful permanent residents to successfully sponsor their family members. Moreover, research has demonstrated that the children of immigrants are among the strongest economic and fiscal contributors in the United States, based on their higher wages and salaries.⁸⁵ Therefore, it is unreasonable to preclude the adult sons and daughters of the sponsor and other relatives within the household from promising to help support the intending immigrant in a Form I-864 contract.

Finally, DHS seeks to impose new documentation requirements, including credit reports and scores, and bank account and routing numbers, which are unjustified and fall short of the standards set in the Paperwork Reduction Act. These burdensome documentation requirements will discourage sponsorship, reducing the number of successful applications for lawful permanent residency, and thereby undermine the integration of immigrants into our communities. These changes also reduce the availability of immigration legal services that the states actively support and fund because more staff hours are needed to prepare each application for adjustment of status and immigrant visa.

C. DHS Must Consider the Broad Impacts of the AOS Rule and Provide a Realistic Assessment of the Deterrent Effects.

Under the APA, DHS is required to consider all "important aspect[s] of the problem," including alternative approaches to address the problem and reliance interests engendered in the agency's prior policy. *See Motor Vehicle Mfr. Ass'n*, 463 U.S. at 43; *FCC v. Fox Tel. Stations, Inc.*, 556 U.S. 502, 515 (2009) (A "more detailed justification" required when a "new policy rests upon factual findings that contradict those which underlay [the agency's] prior policy; or when its prior policy has engendered serious reliance interests".); *Dep't of Homeland Security v. Regents of the Univ. of Calif.*, 140 S.Ct. 1891, 1910-15 (2020). DHS must consider the impacts from a quantitative and qualitative standpoint, and how the consequences of the agency's action "radiate outward" to immigrants' families, including U.S. citizens, children, as well as schools and employers affected by the policy. *Regents*, 140 S.Ct. at 1914.

The Notice of Proposed Rulemaking has failed to consider the broad range of critical consequences that the AOS Rule will have on public health, state and local finances and

⁸⁵ NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION 9 (2017), <https://doi.org/10.17226/23550> (hereafter "NAS Study") (Exhibit 66).

administrative duties,⁸⁶ the economy,⁸⁷ as well as U.S. citizens and lawful permanent residents seeking permanent immigration status for their loved ones.⁸⁸ See e.g. 85 Fed. Reg. 62,452-53, Table 2. For example, DHS acknowledges that the AOS Rule will deter sponsors' and joint sponsors' participation in public benefit programs (but overlooks the deterrent effect for household members),⁸⁹ 85 Fed. Reg. 62,468, but does not analyze the potential scope of the deterrent effect⁹⁰ or assess the related, foreseeable risk posed to public health.⁹¹ These effects include, but are not limited to, the costs that arise from increased hospitalizations, deaths, and other factors, that result from lower vaccination rates and delayed care; the costs associated with increased uncompensated, emergency care; and the losses tied to reduced federal funding provided to states for enrolled beneficiaries.⁹²

As part of its assessment of the costs and benefits of the AOS Rule, DHS estimated the number of individuals annually who could lose the ability to serve as a sponsor if the new regulations penalizing use of means-tested public benefits were enacted. See 85 Fed. Reg. 62,451, 62,470. DHS estimated that 21.3 percent of the U.S. population participates in one or more major means-tested assistance program, and also estimated the total population executing annually an Affidavit of Support. Using these estimates, DHS estimated that there could be approximately 228,350 fewer individuals annually who could execute an Affidavit of Support and sponsor an intending immigrant. DHS might contend that these same individuals could also decide to forgo or disenroll from benefits to preserve their ability to sponsor a loved one.

⁸⁶ See CENTER ON BUDGET AND POLICY PRIORITIES COMMENT, *supra* note 46 (lower Medicaid enrollment and increased uncompensated care hurt states); Santa Clara County Comment, *supra* note 20 at 17-20 (significant programmatic costs on county healthcare system and burdens on bundled public benefit system); California Attorney General Comment, *supra* note 20 at 34-36 (impact on California's streamlined application processes and automated and consolidated system for healthcare eligibility).

⁸⁷ See NAS Study, *supra* note 85.

⁸⁸ See *supra* note 1. See Colleen K. Vesely et al., *Immigrant Families Across the Life Course: Policy Impacts on Physical and Mental Health*, NAT'L COUNCIL ON FAMILY RELATIONS (2019) <https://tinyurl.com/NCFRpolicybrief> (Exhibit 67); Allison Abrams, *Damage of Separating Families*, PSYCH. TODAY, June 22, 2018, <https://tinyurl.com/AbramsSeparation>; Yeganeh Torbati, *U.S. Denied Tens of Thousands More Visas in 2018 Due to Travel Ban: Data*, REUTERS, Feb. 29, 2019, <https://tinyurl.com/TorbatiReuters> (describing a U.S. citizen's plight to obtain a visa for his wife; their separation was causing them to "break down psychologically").

⁸⁹ DHS is able to estimate the number of household members who execute a Form I-864A. See 85 Fed. 62,471.

⁹⁰ Compare 85 Fed. Reg. 62,468 with Bernstein, *supra* notes 9, 11, and 13 (documenting reported chilling effect rates) and 83 Fed. Reg. 51,266, 84 Fed. Reg. 41,463 (agency estimate of chilling effect rate of 2.5 percent).

⁹¹ Similarly, DHS acknowledges that the AOS Rule may increase child poverty, including among U.S. citizens, but it does not consider the effects of any such increase. 85 Fed. Reg. 62,474.

⁹² See CENTER ON BUDGET AND POLICY PRIORITIES COMMENT, *supra* note 46 at 102-104 (costs associated with poorer prevention and treatment of communicable diseases), 105-107 (empirical research concerning relationship between health coverage and uncompensated care costs), 107-108 (economic impact on states and businesses and entities assisting families facing hardship). DHS has requested comment on the economic effects of the proposed joint-sponsor requirement, but the limited 30-day public comment period does not allow an opportunity to provide a detailed response. An extensive body of research documents the economic contributions of immigrants and the economic risks posed by lower inflows of immigration. See NAS study, *supra* note 85; CENTER ON BUDGET AND POLICY PRIORITIES COMMENT, *supra* note 46 at 28.

The deterrent effect, however, will reach a much larger population of individuals. This larger deterrent effect is due to the penalty's application to sponsors *and* household members,⁹³ the 36 month look back period, and the existence of backlogs affecting individuals who have filed family-based petitions for immigrant visas. There are millions of U.S. citizens who have already petitioned for a close family member to immigrate through a family preference category or as an immediate relative.⁹⁴ While these sponsors and their family members wait "in line" they may forgo or disenroll from means-tested public benefit programs to avoid the more stringent joint sponsor requirement. Similarly, potential joint sponsors may avoid such programs to prevent disqualification from executing an Affidavit of Support. In addition to these directly impacted individuals who are not included in DHS' estimates, past experience demonstrates that changes to these type of immigration law will create fear and confusion that will further discourage participation in public benefit programs.⁹⁵ DHS may not grossly understate the magnitude of its Proposed Rule's deterrent effects.

Furthermore, while DHS has acknowledged that the AOS Rule will reduce the number of individuals who can qualify as sponsors, it has sidestepped any qualitative assessment of the impact of less family unity for U.S. citizens and lawful permanent residents. Reasoned decisionmaking requires assessment and weighing of this consequence of the AOS Rule, as family reunification is a central goal of the INA. In addition, DHS must seriously consider the reliance interests of the millions of U.S. citizens and lawful permanent residents who have filed petitions for their loved ones in pursuit of legal pathways for their immigration.

DHS cannot hide behind uncertainty as to the precise extent of the important consequences of its policy. Rather, the agency must consider in its estimates and reasoning all significant data, information, and research, either cited herein or put before the agency in comments and challenges to the Public Charge Rule. In its proposed rule, DHS offers no evidence or analysis sufficient to justify the Rule.

⁹³ Furthermore, depending on how DHS construes "household member" under proposed 8 C.F.R. § 213a.2(c)(2)(ii)(C)(4)(i), it may be limited to the sponsor's spouse, or the term may apply to all individuals counted as part of the determination of the sponsor's household size.

⁹⁴ *Supra* note 7. The Affidavit of Support is not required initially in the multi-step process for an immigrant visa. At a later point, months, years, and sometimes decades later, the AOS is required to be filed, as an immigrant visa becomes available. See DEP'T OF STATE, IMMIGRANT VISA PROCESS, <https://travel.state.gov/content/travel/en/us-visas/immigrate/the-immigrant-visa-process/step-1-submit-a-petition.html> (Exhibit 68). There are significant backlogs for various countries and family preference categories. Many sponsors who have submitted the initial Form I-130 petition for their relative, and are waiting in the "line" for some period of time. If the AOS Rule is adopted, while waiting, sponsors and their household members may avoid benefits. This year the Department of State has significantly delayed its processing of family-based applications for immediate relatives, as well as fiancées, expanding the scope of the AOS Rule's deterrent effect. See Jorge Loweree, et al., *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System*, American Immigration Council, 10-17, Figs. 1 & 2 (Sept. 30, 2020) <https://tinyurl.com/AIC-2020-Immig>; Natacha Larnaud, *A Part of Me Is Missing: COVID-19 Travel Bans Continue to Separate Families and Couples*, CBS NEWS, Oct. 8, 2020, <https://tinyurl.com/CBS-Fiancees>; Sarah Martinson, *U.S. Citizens Say State Dept Illegally Delaying Fiancée Visas*, LAW 360, Sept. 21, 2020, <https://tinyurl.com/Law360-Milligan> (describing *Milligan v. Pompeo*, Case No. 1:20-cv-02631 (D.D.C.)).

⁹⁵ See Fix Study, *supra* note. 15.

D. The AOS Rule Violates Federal Law Prohibiting Discrimination Against Persons with Disabilities.

The AOS Rule is also unlawful because it conflicts with federal law prohibiting discrimination based on disability, including Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq.*, Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001, *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, as interpreted, in part, by the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999).

As commenters explained in response to the public charge rule, “Medicaid is often the only program available to and appropriate for people with disabilities” because private insurance does not cover many services essential to certain individuals with disabilities.” 84 Fed. Reg. 41,367. The AOS Rule, however, contains no exceptions or reasonable accommodations for individuals with disabilities, instead subjecting any person who has received Medicaid during the relevant time period to a categorical rule that they must present a joint sponsor with their own Affidavit of Support as part of their petition, and if they fail to do so, their family member will be denied permanent residency.⁹⁶ The AOS Rule also disqualifies individuals with disabilities who receive Medicaid from serving as joint sponsors.⁹⁷ Finally, the AOS Rule subjects sponsors to disability discrimination by virtue of their association with household members who have a disability and may be recipients of such benefits. When a household member with a disability has received Medicaid during the relevant time period, the petitioning or substitute sponsor must present a joint sponsor to demonstrate that they have the means to support their family member.⁹⁸

The Rehabilitation Act prohibits executive branch agencies and recipients of federal financial assistance, including the DHS, from excluding from participation in, denying benefits of, or subjecting to discrimination under any federally funded program or activity, a person with a disability “solely by reason of her or his disability.” 29 U.S.C. § 794(a). This prohibition on “discrimination solely on the basis of disability” applies to facially neutral laws that deny meaningful access to federally assisted programs and activities that remain open and easily accessible to others. *Alexander v. Choate*, 469 U.S. 287, 295 (1985); *see also Mark H. v. Lemahieu*, 513 F.3d 922, 937 (9th Cir. 2008) (Section 504 does not “merely prohibit intentional discrimination”). Even if a regulation’s language or purpose is unrelated to disability, it still may be discriminatory if enforcement would burden individuals with disabilities in a manner different from and greater than the burdens on individuals without disabilities, solely as a result of their disability. *McGary v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004); *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996). The AOS Rule effectively denies access to family immigration for some individuals with disabilities. *See, e.g., Cook County, Illinois v. Wolf*, 962 F.3d 208, 228 (7th Cir. 2020) (holding that the public charge rule “penalizes disabled persons in contravention of the Rehabilitation Act”).

⁹⁶ See 85 Fed. Reg. 62,442; proposed 8 C.F.R. 213a.2(c)(2)(ii)(C)(4)(i).

⁹⁷ See 85 Fed. Reg. 62,442; proposed 8 C.F.R. 213a.2(c)(2)(ii)(C)(4)(i).

⁹⁸ See proposed 8 C.F.R. 213a.2(c)(2)(ii)(C)(4)(i).

E. The AOS Rule Violates Limitations on the SAVE System.

DHS and USCIS recently published notice of their expanded uses and information collections concerning the SAVE Program. *See Notice of Modified System of Records*, 85 Fed. Reg. 31,798 (May 27, 2020). DHS and USCIS announced their intent to collect information from benefit-granting agencies regarding benefit eligibility determinations, among other types of information, connected to immigrant applicants for public benefits. The AOS Rule also includes proposals to expand the use of the SAVE Program. Certain undersigned states and the City of New York have previously raised objections to DHS's expansion of the SAVE Program.⁹⁹ Those objections are incorporated here. The DHS must address concerns that this expansion violates federal law, *see, e.g.*, Pub. L. No. 99-603, tit. I, pt. C § 121(c)(1), 100 Stat. at 3391 (requiring that the SAVE program not be used by DHS for administrative immigration enforcement purposes that are unrelated to public benefit eligibility verification), and raises a host of concerns regarding administrative burdens, inefficiencies, and interference with the established, lawful administration of public benefit programs.

F. If Adopted, the Rule Will Have a Disparate Impact on Non-White/European Immigrants.

The AOS Rule violates the requirements of equal protection under the Due Process Clause of the Fifth Amendment. Like the enactment struck down in *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), the Proposed Rule does not accomplish what the Affidavit of Support legislation was designed to support—the protection of the public fisc—but instead is based on animus towards a politically unpopular group of immigrants and their families. Furthermore, the AOS Rule is a pillar in the President's quest to expand radically public charge doctrine, driven by a desire to gut family based immigration, and thereby reduce the presence of non-White, Non-European immigrants in the U.S. The AOS Rule will negatively impact a disproportionate number of African, Latino, and Asian immigrants, as well as their family members, and while it is neutral on its face, it reflects a pattern unexplainable on grounds other than impermissible race discrimination. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). The AOS Rule should be rejected on this basis as well.

⁹⁹ *See* June 26, 2020 Multistate Comment Letter (Docket No. USCIS-2020-2014). *See also* February 17, 2020 New York City Comment Letter (DHS Docket No. USCIS-2019-0026).

V. CONCLUSION

For the reasons discussed above, we respectfully urge DHS to withdraw immediately the Proposed Rule, or at a minimum, to postpone any consideration of this or similar rules until after resolution of the ongoing global pandemic and national public health emergency.

Sincerely,



XAVIER BECERRA
California Attorney General



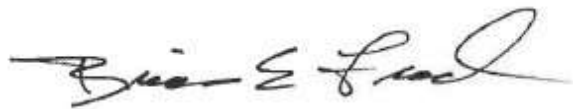
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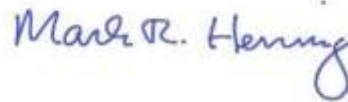
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